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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1188

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

versus

ALLISON BUTLER,
Respondent.

Petition For a Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

HARRY McCALL, JR.
1000 National Bank of Commerce Building
New Orleans, Louisiana 70112
Counsel for Petitioner

December, 1970

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970

No.

SOUTHERN PACIFIC
TRANSPORTATION COMPANY,
Petitioner,

versus

ALLISON BUTLER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Southern Pacific Transportation Company (successor to Southern Pacific Company), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on August 27, 1970.

OPINION BELOW

The opinion of the Court of Appeals, reported at 431 F. 2d 77, appears as Appendix A hereto. No opinion was rendered by the District Court for the Eastern District of Louisiana, New Orleans Division.

Notice of the Court's order denying the petition for rehearing appears at Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit sought to be reviewed was entered on August 27, 1970. A timely petition for rehearing was denied on October 26 1970.[1] This petition for certiorari was filed within ninety (90) days from the date of denial of rehearing. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, in reversing the judgment of the trial court upon a verdict in favor of defendant, on the stated ground of exclusion of a document

(a) which was not offered in evidence,
(b) which formed no part of the record,
(c) as to which no ruling was made by the court,
(d) as to the effect of which upon the jury's deliberations the Court of Appeals could only speculate, and
(e) which the Court of Appeals incorrectly stated "clearly conflicts with the position taken by Appellee in the litigation",

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[1]Apparently the petition for rehearing gave the Court of Appeals some pause, as it directed counsel for Appellant to file a response thereto before denial thereof.

the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this court's power of supervision."

STATEMENT OF THE CASE

Respondent, Allison Butler, was injured when a bundle of plywood fell on him as he was unloading a boxcar of plywood delivered by petitioner, Southern Pacific Transportation Company, to his employer's warehouse at New Orleans.

The shipment had been derailed en route, necessitating its transfer to another car. Reloading was accomplished by petitioner in the normal and usual manner of stacking bundles of horizontal sheets across the car, beginning at the ends and working toward the middle.[a] However, since the original car was forty feet long and the available replacement car was fifty feet long, there was a space approximately in the center of the car which was too small for a horizontal bundle. In order to make a solid load and prevent longitudinal movement in transit, petitioner's agents filled this opening by inserting vertical sheets of plywood from the side until the fit was tight.[b]

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[a] Each sheet measured 4 by 8 feet and the inside width of the car was 9 feet 4 inches.

[b] These filler sheets were stood on end (the 4-foot measurement) in two sets next to each other, fastened together by a steel strap or band which prevented any sheets from working their way out sideways and so losing the door, making a bulkhead the thickness of the opening and eight feet square.

When the car doors were opened for unloading by respondent's employer, the presence of this vertical filler stack in the edge of the doorway was noted.[4] Instead of reversing the loading procedure and removing this stack first, however, unloading was commenced by removal of several of the horizontal stacks in the doorway, including the horizontal stack next to the vertical filler stack. As the last sheets of this adjacent horizontal stack were being removed from the car on a heavily loaded dolly, the car was caused to rock slightly. This rocking of the car unbalanced the by then unsupported vertical stack, causing it to fall onto respondent and thereby to injure him.

It was undisputed that plywood moving by rail was normally loaded in horizontal stacks to avoid damage to the ends thereof. Respondent therefore contended that petitioner was negligent in inserting the vertical filler stack and that this negligence was the proximate cause of the accident and his injuries. Petitioner contended that this use of a vertical filler stack was not negligent and that, in the alternative, if held to be negligent, such negligence was not the proximate cause of the accident; it contended that the proximate cause of the accident was the negligence of those who unloaded the car in removing the adjacent horizontal

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[4]The car doors were double width, consisting of two doors on each side, but were offset so that, when they were all open, the opening through the car was the width of a single door. Consequently, the middle of each door was directly opposite the door post on the opposite side and, the door on the opposite side from that into which the reloading had been accomplished being opened, the vertical stack was in the edge of the doorway rather than in the center.

stacks, which would have prevented the vertical stack's falling, and in rocking the car with the vertical stack in this unsupported position.

In the course of the trial, respondent adduced testimony from employees of U. S. Plywood that use of vertical filler stacks was unusual and unsafe. During the fourth day of the trial, on cross-examination of petitioner's employee responsible for the reloading, counsel for respondent sought to fortify this contention by interrogating him as to an undated pamphlet published by petitioner on proper methods of loading plywood in closed cars. Petitioner objected to any reference to the pamphlet without a showing that it was published prior to the date of the accident[3] and the trial was recessed in order to make a long distance call to petitioner's principal office in San Francisco, following which recess and a later telephone call, *counsel for respondent abandoned this line of questioning. The pamphlet in question was not identified as an exhibit, was not offered in evidence, was not made the subject of an offer of proof and no ruling on its admissibility was issued by the court.*

In support of its contention that the proximate cause of the accident and respondent's injuries was the negligence of those unloading the car in not determining that the vertical stack was secured against falling and in assuming that it was so secured, petitioner adduced testimony of witnesses experienced and expert in the unloading of cars. At the conclusion of the testimony

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[3]This objection and its basis do not appear in the record, Tr. 662.

and argument, the case was submitted to the jury on interrogatories, in response to which the jury found (1) petitioner negligent in its method of reloading the boxcar, (2) respondent's employer negligent in its method of unloading the boxcar, and (3) that the negligence of respondent's employer constituted an independent intervening cause relieving petitioner of any liability for its original negligence.[6] Judgment was accordingly entered dismissing respondent's complaint.

Respondent thereupon filed a motion for a new trial alleging, *inter alia*, that:

"V.

> "Plaintiff attempted to introduce into evidence a manual published by Southern Pacific Railroad Company, the defendant, entitled, '*How to Load Plywood in Closed Cars*,' a copy of which is attached marked Exhibit # P-27. *The purpose of this was to show on rebuttal that defendant knew, or should have known, the proper method of loading plywood in closed cars.*
>
> "Counsel ... had relied heavily on this publication to rebut the testimony of Mr. MacTavish, defendant's agent, who had supervised the loading of the plywood."[7]

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[6] A copy of the interrogatories and the jury's answers thereto appear herein under the heading "Reasons for Granting the Writ", *infra*, p. 8.

[7] Emphasis Added. This numbering of the attachment to respondent's motion is misleading, as the pamphlet in question was not so identified during the trial, the last exhibit filed or offered in the trial court having been Exhibit P-26. The pamphlet forms no part of the record.

With respect to this report, the Court of Appeals said:

> "... Appellant sought to show by this report, which tended to indicate that plywood should be stacked horizontally, that appellee was aware of proper procedures for loading the material and thus was negligent in inserting a vertical filler stack when it reloaded the shipment. In addition *the report could well have been* of probative value to appellant in regard to the reasonableness of the unloaders' conduct, since *it might have established* that they were correct in believing that the vertical stacks would be secured to the sides of the boxcar and thus would not fall when the horizontal stacks were removed. The trial judge excluded the report after a long distance telephone call indicated it was published subsequent to the incident. We hold that this exclusion was in error and that it necessitates a new trial."*

The Court of Appeals' statement of the circumstances and its ruling completely disregard the record which shows, without contradiction, that:

(1) The trial court at no time excluded the pamphlet;
(2) The pamphlet was not offered in evidence;

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*Emphasis Added. What respondent "sought to show by this report" could only be determined from respondent's motion for a new trial and briefs in the Court of Appeals, as the record in the trial court is devoid of any offer of proof or explanation of purpose.

(3) There was no offer of proof with respect to the pamphlet; and

(4) The stated purpose of its introduction was to establish negligence on the part of petitioner, — which the jury found — so that if there had been an exclusion, it would have constituted harmless error.

(5) No "position" was taken by petitioner in the litigation with which the pamphlet conflicted.

All of these points were brought to the attention of the Court of Appeals in Petitioner's application for a rehearing and were not rebutted by the response which the court called for from respondent, but the court refused to reconsider its grossly erroneous appreciation or utter disregard of the record and denied the application for a rehearing without comment.

REASONS FOR GRANTING THE WRIT

This cause was tried to a jury for four days and is reported in a transcript of 872 pages. After deliberating for almost four hours on the evening of the fourth day of the trial, returning to the courtroom for further instructions, and deliberating another hour and one half, on the morning of the fifth[9] day, the jury returned its verdict on interrogatories as follows:

"Was the defendant Southern Pacific Company negligent in the reloading of the boxcar

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[9]Tr. 840-3, 851, 864-70.

in this case?
"Yes.

"(b) Was United States Plywood Corporation negligent in the manner in which the boxcar in question was loaded?
"Yes.

"(c) If your answer to interrogatory 1(b) is "yes", was the negligence of the United States Plywood Corporation an independent intervening cause which would relieve the Southern Pacific Company of any liability for its original act or omission?
"Yes.

"Dated: March 4th, 1969, and signed William J. Smither, Foreman."[10]

The Court of Appeals reversed on the stated ground that the trial judge had erroneously excluded a pamphlet on How to Load Plywood published by Defendant which "could well have been of probative value" for a purpose other than that for which it was supposedly offered.[11] In fact *the trial court did not exclude this document*, as it was never offered in evidence, and the Court of Appeals' statement is demonstrably incorrect.

What actually happened is reflected in the record of respondent's counsel's examination of petitioner's

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[10]Tr. 866-7
[11]431 F. 2d at p. 79.

employee who had reloaded the car.[12] Counsel first asked this witness several general questions about written instructions as to loading plywood in boxcars and then the following colloquy ensued:

> "Q. Are you aware that a study was conducted by the Southern Pacific of 1,750 boxcars of plywood. . . .
>
> "THE COURT:
> "When?
>
> "THE WITNESS:
> "To answer your question, yes, I am aware of it.
>
> "BY MR. STEPHENSON:
> "Q. Could you tell us when it was made?
> "A. After this, I am quite sure.
> "Q. Do you remember when?"
> "A. No sir, not specifically."[13]

Counsel then stated that he was going to show the document to the witness, when he was interrupted by the court to ascertain whether it had been shown to counsel for petitioner, and a conference of court and counsel ensued outside of the hearing of the jury, at the conclusion of which the court made the following statement:

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[12]The employee in question had been called by petitioner as its witness and the interrogation in question took place on the fourth day of the trial.

[13]Tr. 682

> "Members of the Jury, it is going to take me a few minutes to get to the bottom of this problem and resolve it, and I am going to give you a recess until a quarter to 12:00 . . ."[14]

When the jury returned after the noon recess, the judge noted that the recess had been extended and:

> ". . . . But during that la recess, because of the problems posed, there is a factual matter that we had to make a number of long distance calls on, and, as a matter of fact, we are waiting on the answer now, but we are going to go on to something else."[15]

Addressing himself to counsel for respondent, the judge then said:

> "All right, then we are still on the cross-examination.
>
> "And I believe that you are going to withdraw the question temporarily?
>
> "MR. STEPHENSON:
> "Yes, *temporarily we will withdraw the question* until information is made available."[16]

Further on in his cross-examination of this witness, counsel asked whether he recalled whether there were

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[14]Tr. 683
[15]Tr. 684
[16]Tr. 685; Emphasis added.

any directives in force on the day of the accident (October 1962) or prior thereto concerning the proper way to load boxcars of plywood, to which the witness answered that he did not remember.[17] *Counsel concluded his examination of this witness without making any further reference to this document or the purpose for which he had sought to introduce it and without making any offer of proof, and the court had no occasion to exclude it.*

The record contradicts the Court of Appeals' statement that "The trial judge excluded the report ...": there was no occasion to do so, for it was at no time offered in evidence, by means of an offer of proof or otherwise, and no effort was made to raise and preserve the point of alleged exclusion. When he concluded his examination of petitioner's employee with whom he first raised the question of the pamphlet, *counsel made no objection to any ruling of the court nor any attempt to preserve the point of alleged exclusion of the report*, simply stating that he had no further questions, and the court reminded him that the point had not yet been decided:

> "THE COURT:
> "Except for the reservation of questions along the line we mentioned earlier."[18]

On voir dire of defendant's next witness, counsel for plaintiff asked him whether he was familiar with any pamphlets put out by petitioner on how to load plywood

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[17] Tr. 691. To the same effect, see question and answer at Tr. 696-7
[18] Tr. 701

in closed cars and, upon receiving a negative answer, pursued the matter no further."[19] There is no other reference to the pamphlet and as stated above, there was no order of exclusion.

Implicitly recognizing the insufficiency of its rationalization, premised on misstatement of facts, the Court of Appeals sought to buttress its conclusion:

> "... there is yet another reason that compels admission of this report: We find it constitutes a classic admission of the appellee, Southern Pacific."[20]

The premise for this conclusion was the court's statement that

> "... During the course of the litigation Southern Pacific maintained that it had little experience in or knowledge of loading plywood ..."[21]

This statement is incorrect and the record so shows. Counsel for respondent contended that petitioner's answers to certain interrogatories had misled him into this belief, but the answers themselves lend no support to such a contention. Thus two answers to a series of interrogatories as to industry practice, say nothing about petitioner's knowledge:

Answer to Interrogatory No. 23:

"It is not the practice of defendant to load

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[19]Tr. 766
[20]431 Fed. 2d at P. 80
[21]Ibid.

plywood into or onto railroad cars and it does so only in the event of an emergency such as occurred herein. . . ."

Answer to Interrogatory No. 39:

"As is stated in answer to Interrogatory No. 23, it is not the practice of defendant to load plywood into or onto railroad cars and it does not purport to speak for the industry generally . . ."

Clearly these answers did not and do not "maintain [ed] the position that it had little experience in or knowledge of loading plywood" but merely disclaimed any role as spokesman for the industry generally. Here again the Court of Appeals has misstated the record to justify its conclusion.

It is submitted that, even if the Court of Appeals were correct in its statement that the pamphlet was excluded (which the record contradicts), respondent's failure to raise and preserve the point would prevent its consideration on appeal. Thus, although Rule 43(c) of the Federal Rules of Civil Procedure makes an offer of proof permissive, Rule 46 makes it quite clear that a party may not simply remain silent:

". . . for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court

to take or his objection to the action of the court and his grounds therefor; . . ."

That failure to do this is prejudicial is clear from the concluding provision of this same rule that there is no prejudice if there is no opportunity to object.

As appears from the following excerpt from Corpus Juris Secundum, this is the general rule:

> "A proper and timely objection in the court below is necessary to preserve for appellate review an order of the court excluding or striking evidence; under a number of authorities, only those grounds of objection which have been urged in the trial court will be considered by the appellate court for the purpose of reversing the order of exclusion, and grounds or purposes rendering the evidence admissible which are not urged in the trial court cannot be considered in the appellate court." 4 CJS 893-4, *Appeal and Error*, Sec. 291(a).

There is considerable authority for the proposition that an offer of proof or its equivalent is indispensable for an appeal;

> . . . "Under the circumstances, it is clear that the failure to make an offer of proof must be held to be fatal to the prosecution of this appeal." *Marrone v. U. S.*, 355 F. 2d 238, 241, 2 Cir. 1966.

"... We have held generally that the rejection of testimony is not reviewable in the absence of an offer of proof ..." *Solomon Dehydrating Company v. Guyton*, 294 F. 2d 439, 449, 8 Cir. 1961.

"... There was no offer to prove what the witness, if permitted to testify, would have said. To warrant a reversal it is incumbent upon an appellant to show not only that technical error occurred but that the error was prejudicial. Without knowing what the witness would have said if permitted to answer, it is impossible for us to conclude that defendant was prejudiced by the ruling now complained of. The general rule is that a ruling rejecting testimony is not reviewable in the absence of an offer of proof ..." *U. S. v. Stoppelmann*, 266 F. 2d 13, 20, 8 Cir. 1959.

If only to give the trial court an opportunity to correct a ruling which is claimed to be erroneous, the appealing party should make some statement as to how he claims to be prejudiced:

"[5] Regardless of the flexibility of the Rules of Civil Procedure and how loose some schools of thought may be as to how those rules should be applied, one thing is certain * * * error cannot be claimed as to the trial court procedure, nor rulings made as to the admission of evidence, absent some showing of the character and circumstances under which

such a ruling has been made ..." *Andrews v. Olin Mathieson Chemical Corporation*, 334 F. 2d 422, 428, 8 Cir. 1964.

Clearly a litigant who conceives himself to be prejudiced by a ruling of the court must so state and make clear the prejudice that he claims to have suffered:

> "... Rule 46 of the Federal Rules of Civil Procedure, 28 U.S.C.A. requiring a party to make known his objections and grounds therefor is not a mere technicality, but is of substance in the administration of business of the courts ... The purpose of this rule is to inform the trial judge of possible errors so that he may have an opportunity to reconsider his ruling and make any changes deemed advisable. It is therefore the general rule that points not raised and preserved below will not be considered on appeal." *Fort Worth and Denver Railway Company v. Harris*, 230 F. 2d 680, 682, 5 Cir. 1956.

> "... Although Rule 46, F.R.Civ.P., makes a formal exception unnecessary, a party must still make it clear that he objects to an action of the court in order to preserve the point for an appeal ..." *U. S. v. Vater*, 259 F. 2d 667, 672, 2 Cir. 1968.

Particularly pertinent to the Court of Appeals' statement that the report in question "could well have been of probative value" and "might have established the

correctness of the belief on the part of those unloading the car that the vertical stacks would be secured" are the following holdings:

> "... where the significance of the evidence sought to be introduced is not obvious, an appellate court cannot be expected to hold exclusion to require reversal on the possibility that the exclusion was harmful error...."
> *Moss v. Hornig*, 314 F.2d 89, 93, 2 Cir. 1963.

> "... where ... the significance of the excluded evidence is not obvious, we could not be expected to reverse on the mere possibility that the exclusion was harmful ..." *Hoffman v. Palmer*, 129 F. 2d 976, 994, 2 Cir. 1942.

If then,

> — the Rules of Civil Procedure direct one who considers himself aggrieved by a court's ruling to "make[s] known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor",
>
> — the general rule is that somehow "a party must ... make it clear that he objects to an action of the court in order to preserve the point for an appeal", and the various Courts of Appeals have repeatedly so held, and

— there must be a clear showing of prejudice, and not a "mere possibility that the exclusion was harmful",

how can reversal be justified where

— there was no exception, protest or objection to any action by the court.

— there was no ruling by the court excluding the document in question, but a voluntary abandonment of any effort to introduce it in evidence, and

— the Court of Appeals found only that the allegedly improperly excluded document "could well have been of probative value" and "might have established "that a certain belief was correct?[22]

The issue presented by this application for writs transcends this particular litigation: the question is whether a ruling of a Court of Appeals which arbitrarily disregards and misstates the record in a case on appeal and sets aside a judgment on a jury verdict in derogation of clear law to the contrary, can stand. The supervisory jurisdiction of this Honorable Court is provided to protect litigants from this type of judicial oppression and should be invoked in the instant case. Clearly the Court of Appeals "has so far departed

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[22]The Court of Appeals had to inject this possible area of prejudice, as the stated purpose for which reference to the pamphlet was sought to be made, viz. to establish negligence on petitioner's part in re-loading the car, was satisfied by the jury's finding of such negligence, thereby removing any basis for a contention of prejudice in this respect.

from the accepted and usual cause of judicial proceedings as to call for an exercise of this court's power of supervision."

A writ of certiorari should be granted herein to review the arbitrary disposition of this appeal in flagrant disregard of the record, the Rules of Civil Procedure and the general jurisprudence.

Respectfully submitted.

SIGNED: HARRY McCALL, JR.

Harry McCall, Jr.
1500 National Bank of
Commerce Bldg.
New Orleans, Louisiana 70112
Counsel for Petitioner

December 29, 1970

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December, 1970, three copies of the petition for writ of certiorari have been delivered to Mr. W. M. Stephenson and Mr. Joseph E. Defley, Attorneys for Respondent. I further certify that all parties required to be served have been served.

SIGNED: HARRY McCALL, JR.

Harry McCall, Jr.
1500 National Bank of
Commerce Bldg.
New Orleans, Louisiana 70112
Counsel for Petitioner

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28965

ALLISON BUTLER,
Plaintiff-Appellant,

versus

SOUTHERN PACIFIC COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(August 27, 1970)

Before BROWN, Chief Judge, GEWIN and THORNBERRY, Circuit Judges.

THORNBERRY, Circuit Judge: This is an appeal from a judgment in a Louisiana diversity action to recover damages for injuries suffered by appellant Butler while unloading plywood from a freight car operated by appellee Southern Pacific Company. The jury in the district court found that Southern Pacific was

negligent but was relieved of its negligence because of the intervening negligence of Butler's employer, United States Plywood Corporation. The district court rendered judgment for the defendant. We remand the case for a new trial because of error in the exclusion of evidence.

In 1962 U. S. Plywood engaged Southern Pacific to transport a quantity of plywood from Samoa, California to New Orleans, Louisiana. While en route the boxcar containing the plywood was derailed in Tesnus, Texas. The plywood was taken to San Antonio, where it was reloaded by Southern Pacific. Although most of the plywood was stacked horizontally in the boxcar, two stacks were loaded vertically, purportedly to tighten the load by filling an empty space. The vertical filler stacks were placed side by side across the boxcar and strapped together near the top by a single band. After loading was completed the boxcar was dispatched on its southern journey, and, after partial unloading in Shreveport, Louisiana, it was delivered to U. S. Plywood in New Orleans for total unloading. Pursuant to the unloading task, Mr. Allison Butler and other U.S. Plywood employees removed several horizontal bundles that lay adjacent to the vertical stacks. Soon thereafter the boxcar was rocked by movement of a heavily loaded dolly across a steel bridge from the car into the warehouse, and the vertical stacks toppled, pinning Butler from the waist down. The jury in the district court found that Southern Pacific was negligent in vertically stacking the plywood but failed to find proximate cause because it found that the conduct of the unloaders was an intervening cause of the

incident. In addition, the jury found Butler contributorily negligent.

This appeal raises three points. Appellant contends that the court erroneously excluded certain evidence he offered, that the manner in which the trial judge questioned one of his rebuttal witnesses was so prejudicial to appellant that he was deprived of a fair trial, and that the trial judge erred in his charge to the jury with respect to intervening cause. Since we agree with appellant's first argument and find the court's exclusion of evidence serious enough to necessitate a new trial, we do not reach appellant's other two points.

One of the items that appellant sought to introduce into evidence was a report by the Specialized Operations Department of Southern Pacific entitled "How to Load Plywood in Closed Cars." Appellant sought to show by this report, which tended to indicate that plywood should be stacked horizontally, that appellee was aware of proper procedures for loading the material and thus was negligent in inserting a vertical filler stack when it reloaded the shipment. In addition, the report could well have been of probative value to appellant in regard to the reasonableness of the unloaders' conduct since it might have established that they were correct in believing that the vertical stacks would be secured to the sides of the boxcar and thus would not fall when the horizontal stacks were removed. The trial judge excluded the report after a long distance telephone call indicated it was published subsequent to the incident .We hold that this exclusion was error and that it necessitates a new trial.

The admissibility of evidence in federal courts is governed by Rule 43(a), Fed. R. Civ. P., which states in part as follows:

> All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made.

Under Rule 43, then, there are three possible sources of authority for admissibility: Federal statutes, decisions of the original federal courts sitting in equity, and state laws. We are required, after examining the sources, to use the most liberal rule dealing with the subject offered. In this case we find that the evidence sought to be introduced was admissible under the second standard as an admission of Southern Pacific.

We begin consideration of the question of admissibility with the proposition that "[t]he Federal Rules and practice favor admission of evidence rather than exclusion if the proferred evidence has any probative value at all." *Aluminum Co. of America v. Sperry Prods. Inc.*, 6th Cir. 1960, 285 F.2d 911. Moreover,

doubts "must be resolved in favor of admissibility." *Erie R. Co. v. Lade*, 6th Cir. 1954, 209 F.2d 948, 951. This Court has also liberally construed Rule 43. In *Monarch Ins. Co. of Ohio v. Spach*,[1] 5th Cir. 1960, 281 F.2d 401, we held, *inter alia*, that no case support need be found to justify admissibility in a situation in which the evidence surely must have been admissible in equity. We further stated, "[The rule] defines the three standards of admissibility. But it does not purport to prohibit the admission of other relevant material probative evidence which, in the considered exercise of judicial wisdom, is trustworthy.* * * [I]n today's litigation with its endless complexities many of which are an outgrowth of our scientific age we would hardly think that a court instituted with all of the power the organic constitution could invest in it would have to stand helpless in the face of a new situation." In *Dallas County v. Commercial Union Assur. Co.*, 5th Cir. 1961, 286 F.2d 388, this Court, reinforcing *Spach*, held that evidence that is necessary to a proper consideration of the case and that exhibits an intrinsic probability of trustworthiness ought to be admissible under the liberal federal practice even though within no recognized exception to the hearsay rule. In the case at bar the necessity for the evidence is clear. The report, which was published by appellee, purportedly presents the proper method of loading plywood in closed boxcars. Consequently, the report is of probative value

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[1] Barron and Holtzoff urge that the Spach case "deserves to be followed." 2B BARRON AND HOLTZOFF, § 962, p. 218. This Court has reinforced *Spach* in *Dallas County v. Commercial Union Assurance Co.*, 5th Cir. 1961, 286 F.2d 388, and in *Hambrice v. F. W. Woolworth Co.*, 5th Cir. 1961, 290 F.2d 557.

to appellant in his effort to establish not only that appellee was negligent in vertically stacking the plywood but also that appellant and others who unloaded the boxcar were not negligent in their unloading operations. The information in the report, then, goes to the heart of the case. As to trustworthiness, the report was the result of over 1700 tests of loading patterns conducted by appellee in cooperation with other shippers and manufacturers in the plywood industry. Southern Pacific, of course, has a direct financial interest in furnishing to its employees accurate information concerning proper methods of loading items it carries. Consequently, the existence of inaccurate statements in the report is unlikely. We think, therefore, that the above two tests are satisfied in the case at bar. Aside from this consideration, however, there is yet another reason that compels admission of this report: We find it constitutes a classic admission of the appellee, Southern Pacific.

To be received in evidence an admission (a) must be made directly or indirectly by a party to the action and (b) must be contrary to that party's position at the time of the trial *See* C. McCORMICK, EVIDENCE § 281 (1954); 4 J WIGMORE, EVIDENCE § 1048 (1940); Hetland, *Admissions in the Uniform Rules: Are They Necessary?*, 46 Iowa L. Rev. 307 309 (1961). The report in question was developed by Southern Pacific in cooperation with the American Plywood Association and a number of manufacturers and shippers in the plywood industry. Since the report was prepared and published by the appellee itself, it obviously satisfies criteria(a). During the course of the litigation South-

ern Pacific maintained the position that it had little experience in or knowledge of loading plywood. Yet the same company has authored a report that purports, first, to detail the nature and cause of damage experienced in plywood shipments in which improper packaging and/or loading practices were followed and, secondly, to outline proper packaging, car preparation, and loading procedures to be followed in order to minimize damage or effect damage-free deliveries. The report, which demonstrates an apparent expertise in loading on the part of appellee, thus clearly conflicts with the position taken by appellee in the litigation.

We note that the document in question was apparently prepared after the accident. Both the nature of the report and the circumstances surrounding its compilation, however, evidence that it was not contrived by appellee for use in this litigation. We thus think that the report, clearly an admission, ought to be admitted for the jury to determine whether the procedures and practices detailed in the document were correct and applicable at the time of the accident.[8] Its exclusion by the district court necessitates a new trial.

REVERSED AND REMANDED

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[8] *See also Doss v. Apache Powder Co.*, 5th Cir., 1970, ____ F.2d ____ [No. 27521, slip opinion dated July 24, 1970], wherein we held that a safety manual was properly admitted to show long-standing common knowledge in the industry.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk

Room 408-400 Royal St.
New Orleans, La. 70130
(504) 527-6514

October 26, 1970

TO ALL PARTIES LISTED BELOW

Re: No. 28965 — Butler vs. Southern Pacific Co.

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth,
Clerk
By PAT QUARTARARO
Deputy Clerk

/paq

cc. Mr. W. M. Stephenson
Mr. Joseph E. Defley
Mr. Harry McCall, Jr.